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## ARNI'S ADDENDUM

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### Budget issues in Legislature

The Montana Arts Council's (MAC) budget is heading into the final weeks of the Legislature as I write this column. So far so good. We are all eager to see what happens with the tourism industry's bed tax bill, SB264.

The Cultural Trust grants in HB9 had a glimmer of hope for increased funding through amendments made by Rep. Mitch Tropila (D) of Great Falls. Rep. Tropila sought to use two separate sources of funding in his diligent effort to boost grants. Unfortunately each failed. So, HB9 moves on through the Legislature with the original funding level for grants intact. The bill passed the House 79-21 before Easter and will move into the Senate after that holiday.

### NEA's National Council: Showcasing Montana on a national stage

I had the privilege of receiving an invitation from Dr. Jane Chu, the chairman of the National Endowment for the Arts (NEA), to participate on a panel of three speakers before the National Council (the board of the NEA) at the end of March. I was asked to focus on our Montana Artrepreneur Program (MAP) and its success, relating it back to economic research that the NEA has done nationwide.

It was a marvelous opportunity to showcase Montana on the national stage. What a unique opportunity to put the Montana spin on the incredibly fine research done by the NEA. We were able to tie completely to the Artist Employment research done by Sunil Iyengar and his staff at the Endowment and create a memorable Big Sky Country story of how this data comes to life through our MAP program.

I can tell you that Dr. Chu is a wind to uplift us all. She is so very impressive in her new role as chairman. She brings direct experience with nonprofit arts organizations to this position, and her enthusiasm, warmth and ability to relate so well to people of all walks of life and artists of every level and media, is remarkable. I see why my colleagues speak so highly of her.

It is also most meaningful that the NEA leadership is placing new emphasis on their messaging to reinforce the value of the arts in so many ways. We'll be talking about that in much greater depth in the coming issues as the NEA celebrates its 50th Anniversary the end of September.

There are two very special people at the NEA with whom the arts council works regularly: Laura Scanlan, state and regional director and partnership team leader, and Andi Mathis, state and regional specialist in the Partnership Division. Both of these women are spectacular partners for state arts agencies around the country.

When people have stereotypical impressions of those who work in the federal government, I can tell you they have never met Laura and Andi. They are phenomenal in their true caring about our work, how we interface with the NEA, and how we can work together to make things happen. My special thanks to them for helping Montana receive such a high honor with this invitation to appear before the National Council.

### Independent Contractor vs. Employee

The arts council gets asked many questions about whether one may hire a person as a contractor or do they have to be an employee. We've sought some additional guidance from an expert on these matters: Dallas Cox,

who is supervisor of the Independent Contractor Central Unit for the State of Montana.

It is through Dallas that we learned, for instance, that a nonprofit arts organization can't utilize an executive director as a contractor. They must be an employee because they are under the control of a board of directors and the title "executive director" is a position, not a profession.

We asked him about whether a program manager could be an independent contractor rather than an employee. Here is what he said...

"If the non-profit were to hire a part-time program manager and tell them to run this program without being under the control of the board, they could be an independent contractor. However, in most of these types of positions, where a board is involved, the board usually maintains too much control to use someone as a program manager as an independent contractor."

So it is possible, but the control factors are going to be the deciding element.



MAC Executive Director Arlynn Fishbaugh, shown here with NEA Chairman Dr. Jane Chu and NEA State and Regional Director Laura Scanlan, was invited to participate in a panel during the NEA National Council meeting in March.

### Why is this significant?

I've asked Carleen Layne, our long-time accountant and expert on these matters, to chime in here:

There is a great handout at [erd.dli.mt.gov/work-comp-regulations/montana-contractor/independent-contractor](http://erd.dli.mt.gov/work-comp-regulations/montana-contractor/independent-contractor) and a webinar on the topic, at <https://vimeo.com/55931226>.

The IRS has taken a renewed interest in whether someone is classified as an employee or an independent contractor due to revenue shortages. They believe that a substantial amount of revenue is being lost through misclassification of people who are actually employees, but are currently working as independent contractors. So this means that billions of dollars are lost in federal withholding of payroll taxes every year. The states are interested in this, too, because of the impact on state revenue.

The second reason why it's important is worker's comp coverage. If you are an employee, you are required to be covered by worker's comp. As an independent contractor, you have to either have an exemption or you have to pay for your own worker's comp insurance, and it's not cheap.

If an employer mistakenly contracts with someone as an independent contractor who should have been hired as an employee instead, if they have an accident and have no worker's comp exemption, you, as the employer, are liable for their injuries and/or any damages sustained. This could be catastrophic.

The third reason this is important is that employees are to be paid for time worked, unless they are exempt from overtime, under the Fair Labor Standards Act. Employees cannot just be assumed to be exempt from overtime.

There are specific criteria which must be met to determine if an employee is in fact exempt from overtime, i.e. salaried. Here is a great article on this topic: [www.dol.gov/whd/flsa/](http://www.dol.gov/whd/flsa/). What this means is that if you contracted with an executive director as an independent contractor (which you shouldn't do as stated above), and they worked over 40 hours a week, you would be liable if they sued you for overtime for any hours over 40 they worked per week. This is based on the fact that they were really an employee and are to be compensated for actual time worked.

The other big issue is that frequently employees are paid for fewer hours than they're actually working. For instance, an employee may be paid to work 10 hours a week, but they actually work 20 or 40 hours. That's happening a great deal, and it shouldn't be. Everything is fine as long as people are nice to each other, but as soon as anyone gets mad, they can file a complaint with the State and, if the State finds in their favor, then you have to pay for time actually worked.

The other bugaboo here is not paying employees for travel time to work sites outside of the main facility. Sometimes employers think that the real work is done onsite, but not in a travel status, so they don't want to pay for the time it takes to travel back and forth. This is a big problem if your work takes you hours away from your primary business location – Montana is a big state. We've also seen it happen when boards don't want to pay the executive director's travel time to a conference.

As to all of this, you can decide to not play by the rules, but if caught, you're going to have to face the consequences and you can easily be put out of business. Here are some other links you might find helpful:

- [art.mt.gov/artists/IRS\\_20pt\\_Checklist\\_%20Independent\\_Contractor.pdf](http://art.mt.gov/artists/IRS_20pt_Checklist_%20Independent_Contractor.pdf)
- [art.mt.gov/artists/MT\\_%2015Pt\\_Criteria\\_Independent\\_Contractor.pdf](http://art.mt.gov/artists/MT_%2015Pt_Criteria_Independent_Contractor.pdf)

If you are unclear whether a worker is an employee or an independent contractor, Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding (PDF), can be filed with the IRS. The form may be filed by either the business or the worker.

The IRS will review the facts and circumstances and officially determine the worker's status.

Be aware that it can take at least six months to get a determination. The IRS will be more lenient as to penalties and interest with organizations that are earnestly trying to be aboveboard with them.

Employee or independent contractor? It's a complex issue ... and potentially very costly, financially and every other way, if you get it wrong. But there is help available as noted above, including here at the Montana Arts Council.

## STATE OF THE ARTS

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